

NO. PD-1246-18

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS  
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DEANA WILLIAMSON, CLERK

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STATE OF TEXAS, Petitioner-Appellee

V.

LYDIA METCALF, Respondent-Appellant

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On Petition for Discretionary Review  
From the Sixth Court of Appeals, Texarkana, in Cause No. 06-17-00211-CR  
Reversing Appellant's conviction in the 123<sup>rd</sup> Judicial District Court,  
Panola County, Texas in Trial Court Case No. 2015-C-0290

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**REPLY BRIEF OF RESPONDENT-APPELLANT  
LYDIA METCALF**

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STATE OF TEXAS, Petitioner-Appellee

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LYDIA METCALF, Respondent-Appellant

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**REPLY BRIEF OF RESPONDENT-APPELLANT  
LYDIA METCALF**

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To the Honorable Justices of the Court of Criminal Appeals:

Respondent-Appellant, Lydia Metcalf ask this Court of Criminal Appeals to affirm the judgment of the Sixth Court of Appeals in No. 06-17-00211-CR. In support thereof, Respondent-Appellant would show this Court as follows:

**STATEMENT OF THE CASE**

Lydia Metcalf was indicted in case number 2015-C-0290 in the 123<sup>rd</sup> Judicial District Court, Panola County, Texas for the offense of sexual assault pursuant to Tex. Pen. Code Ann. §7.02. The sexual assault was alleged to have occurred on or about December 10, 2010 (CR 7).

The jury found Lydia Metcalf guilty (C.R. 93-98) and sentenced Lydia Metcalf to 3 years in the Institutional Division of the Texas Department of Criminal Justice (C.R. 99-106, RR, VOL. 6, pg. 74, ll. 4-9).

The court entered its Judgment of Conviction by Jury on October 25, 2017 (CR 109-110). On November 13, 2017, Lydia Metcalf filed her Notice of Appeal (CR 111). On October 16, 2018 the Sixth Court of Appeals rendered its opinion reversing the judgment of the trial court and rendering its judgment of acquittal (APPENDIX TAB 1).

#### **STATEMENT REGARDING ORAL ARGUMENT**

Respondent does not believe oral argument is necessary in this case because the issues presented are not novel, the law of the parties is well settled as is the standards applied when a court reviews evidence supporting a jury verdict.

#### **REPLY TO STATE'S POINT OF ERROR NUMBER ONE**

The evidence was legally and factually insufficient to establish Lydia Metcalf's guilt beyond a reasonable doubt as a party to the sexual assault of Amber as defined in Tex. Penal Code Ann. § 22.011 (a)(1) and applied by Tex. Penal Code Ann. §7.02(a)(2) and §7.02 (a)(3).

#### **REPLY TO STATE'S POINT OF ERROR NUMBER TWO**

The Court of Appeals did not err by conflating the evidentiary requirements of Texas Penal Code Ann. §§ 7.02(a)(2) & 7.02 (a)(3) thereby imposing an additional requirement of proof by the State.

#### **REPLY TO STATE'S POINT OF ERROR NUMBER THREE**

The Court of Appeals did not err by viewing the evidence in isolation and thereby failing to view the combined weight of the evidence that appeared incriminating to Lydia Metcalf.

## **STATEMENT OF FACTS**

Lydia Metcalf objects and disputes the State's Statement of Facts on the grounds it incorrectly characterizes the evidence presented at trial.

Allen Metcalf entered a plea of guilty to 12 counts of sexual assault of his minor step daughter, Amber<sup>1</sup>. (RR, VOL. 8, State's Exhibits 4-15). Amber's mother, Lydia Metcalf was indicted by the Panola County, Texas Grand Jury for an alleged December 10, 2010 sexual assault of Amber. (CR 7).

Allen Metcalf began sexually assaulting Amber when she was 13 years old. Amber testified that she did not tell her mother about the sexual assaults because Allen Metcalf threatened that he would harm her younger brother and sister if she told Lydia Metcalf. (RR. VOL. 4, pg. 104, 11, 22-25, pg. 105, ll, 1-5).

Amber testified that Allen Metcalf would come to her room every night except when she was having her period and would sexually assault her. (RR VOL. 4, pg. 57, ll, 10-14). She testified that she told Allen Metcalf to stop but he refused. (RR VOL. 4, pg. 58, ll, 12-15). Amber testified that she threatened to tell her mother, Allen Metcalf responded by telling her she had better keep quiet or her siblings will get hurt. (RR VOL. 4, pg. 58, ll 16-20). Amber testified that Lydia Metcalf was sleeping when Allen Metcalf came to her room. (RR, VOL. 4, pg. 107, ll. 4-15).

Amber testified she told Lydia Metcalf that she was being sexually assaulted by Allen Metcalf twice. (RR, VOL. 4, pg. 121, ll. 4-15). Amber claimed the first time first time she told Lydia Metcalf she was being sexually assaulted by Allen Metcalf was when she was 15 years old when she told Lydia Metcalf that “Allen was a monster and he did bad things” (RR, VOL. 4, pg. 59, ll. 15-25, pg. 105, ll. 6-25, pg. 121, ll. 4-10). When Amber made this statement to Lydia Metcalf, she gave no reasons for the statement because she was afraid of what Allen Metcalf might do to her brother and sister (RR. VOL. 4, pg. 104, ll. 22-25, pg. 105, ll. 1-5, 16-25, pg. 106, ll 1-7).

Amber testified that the second time she told her mother that Allen Metcalf sexually assaulting her was when she was 16 years old. (RR, VOL. 4, pg. 121, ll. 11-20). Amber testified that she told Lydia Metcalf that Allen Metcalf “slapped her and tried to pull down her pants”. Lydia Metcalf questioned Amber for an hour but Amber refused reveal anything sexual about the event. ((RR, VOL. 8, State’s Exhibit 1). In response to Amber’s outcry, Lydia Metcalf provided Amber a cell phone and a whistle and told her to call 911 if he did anything like that again (RR, VOL. 4, pg. 61, ll. 15-25, pg. 108, ll. 1-25, pg. 109, ll. 1-5).

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<sup>1</sup> The pseudonym name “Amber” is used to refer to the victim to be consistent with the opinion of the court below.

Amber testified that in 2011 Lydia Metcalf walked into her bedroom and discovered Allen Metcalf sexually assaulting Amber. (RR. VOL. 4, pg. 67, ll. 22-25, pg. 68, ll. 1-4). Amber testified that Lydia Metcalf ordered Allen Metcalf out of the house, but she later let him return home. (RR, VOL. 4, pg. 68, ll. 10-13). Amber testified that Allen Metcalf's sexual assaults never occurred again after Lydia Metcalf discovered Allen Metcalf sexually assaulting her in 2011. (RR, VOL. 4, pg. 107, ll. 23-25, pg. 108, ll. 1-25, pg. 109, ll. 1-24, pg. 111, ll. 21-25, pg. 112, l. 1).

Amber moved in with her Aunt, Emma Blakeman on June 7, 2013. (RR, VOL 4, pg. 27. ll. 18-19). After living with Aunt Emma for almost a year Amber told Aunt Emma that she had been sexually molested on a school bus when she was 13 years old. (RR, VOL. 4, pg. 30, ll. 1-5, pg. 31, l. 25, pg. 32, ll. 1-3). Aunt Emma arranged counseling for Amber. Amber testified that when she was 22 years old, she finally told Lydia Metcalf that Allen Metcalf had been sexually assaulting her since she was 13 years old. (RR. VOL. 4, pg. 124, ll. 6-12).

### **SUMMARY OF ARGUMENT**

The Court of Appeals judgment of acquittal of Lydia Metcalf should be affirmed and the State's Petition for Discretionary Review overruled. The Court of Appeals correctly concluded the evidence was legally and factually insufficient to support the jury's guilty verdict because the evidence was too weak and

speculative and failed to prove that Lydia Metcalf had knowledge of the commission of the offense of sexual assault on or before December 10, 2010 and she was therefore unable to form the necessary intent. The evidence was legally and factually insufficient to prove beyond a reasonable doubt that Lydia Metcalf had the necessary criminal intent to promote or assist in the commission of the offense of sexual abuse as required by Tex. Penal Code Ann. §22.011 and the evidence was legally and factually insufficient to prove beyond a reasonable doubt that Lydia Metcalf had the necessary criminal intent at the time of or before the criminal act of sexual assault as required by Tex. Penal Code Ann. §6.03(b). The court further concluded that the evidence was legally and factually insufficient to prove that Lydia Metcalf failed to take reasonable measures to protect Amber from acts of sexual assault committed by Allen Metcalf as required by Tex. Penal Code Ann. §7.02 (a)(3).

### **ARGUMENT AND AUTHORITIES REPLY TO POINT OF ERROR NUMBER ONE**

**The Court of Appeals correctly determined that the evidence was legally and factually insufficient for a rational jury to establish Lydia Metcalf's guilt beyond a reasonable doubt as a party to the sexual assault of Amber as defined in Tex. Penal Code Ann. § 22.011 (a)(1) and applied by Tex. Penal Code Ann. §7.02 (a)(2).**

Lydia Metcalf was indicted and charged with sexual assault under Tex. Penal Code Ann. §22.011 with the criminal liability applied to her by Tex. Penal Code Ann. §7.02(a)(2) or §7.02(a)(3). (C.R. 7).

A person commits sexual assault if he or she intentionally or knowingly causes the penetration of the anus or sexual organ of another person by any means, without that person's consent. Tex. Penal Code Ann. §22.001(a)(1). A person acts intentionally, or with intent, with respect to the nature of his or her conduct or to a result of his or her conduct when it is his or her conscious objective or desire to engage in the conduct or cause the result. Tex. Penal Code Ann. §6.03(a). A person acts knowingly, or with knowledge, with respect to the nature of his or her conduct or to circumstances surrounding his or her conduct when he or she is aware of the nature of his or her conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his or her conduct when he or she is aware that his or her conduct is reasonably certain to cause the result. Tex. Penal Code Ann. §6.03(b).

Proof of party responsibility is governed by Tex. Penal Code Ann. §7.02(a)(2) which requires proof that the party acted with intent to promote or assist the commission of the offense and that he or she solicited, encouraged, directed, aided, or attempted to aid the other person to commit the offense. In this case, the jury was additionally charged that Lydia Metcalf could be criminally responsible for the offense if she, "acting with intent to promote or assist" the commission of the offense, and she fails to make a reasonable effort to prevent the commission of the offense. Tex. Penal Code Ann. §7.02(a)(3). (C.R. 96-97).

**Lydia Metcalf did not have knowledge of the commission of the crime to form the requisite intent to promote or assist in the commission of the offense?**

Amber testified that she told Lydia Metcalf that Allen Metcalf was sexually assaulting on two separate occasions. Amber claimed the first time she told Lydia Metcalf was when she was 15 years old when she stated to Lydia Metcalf that Allen Metcalf “was a monster and did bad things”. Amber testified that she did not relate to her mother any other information or use any words that Allen Metcalf’s sexual conduct toward her motivated the statement. (RR, VOL. 4, pg. 59, ll. 15-25, pg. 105, ll. 6-25, pg. 121, ll. 4-10). Amber refused to answer Lydia Metcalf’s questions about the event because, according to Amber’s testimony, Allen Metcalf threatened her that if she told her mother he would harm her brother and sister (RR, VOL. 4, pg. 53, ll. 16-24, pg. 58, ll. 16-20).

Amber testified that the second time she told Lydia Metcalf she was being sexually assaulted by Allen Metcalf was when she was 16 years old and she told her mother that Allen Metcalf “slapped her and tried to pull her pants down”. (RR, VOL. 4, pg. 95, ll. 8-12, pg. 121, ll. 11-20, pg. 122, ll. 17-25, RR, VOL. 8, State’s Exhibit 3). Amber did not tell her mother that Allen Metcalf sexually assaulted her, nor did she use words that would cause Lydia Metcalf to believe the reason for Amber’s outcry was based on Allen Metcalf’s sexual conduct. Instead, Amber described the incident as a physical assault by referring to being slapped. Lydia Metcalf attempted to get more information from Amber by asking her if this was

the “only time” and Amber lied to Lydia Metcalf by replying “yes” (RR, VOL 8, State’s Exhibit 3). Lydia Metcalf confronted Allen Metcalf about the incident, and he denied the event was sexual in nature. At this point, Amber refused to disclose to Lydia Metcalf that Allen Metcalf had sexually assaulted her and was purposely lying to Lydia Metcalf when asked questions about the event, and, on the other hand, Allen Metcalf was denying there was any sexual aspect to the occurrence. (RR, VOL. 4, pg. 95, ll. 8-12, RR, VOL. 8, State Exhibit No. 3).

The fear Allen Metcalf instilled into Amber was significant because it resulted in a conscious and deliberate effort by Amber to prevent her mother from learning that she was being sexually assaulted by Allen Metcalf. Instead of crying out for help to Lydia Metcalf, Amber did the opposite and kept Allen Metcalf’s sexual assaults a secret she would not fully disclose to her mother for another six years. (RR, VOL. 4, pg. 124, ll. 9-12).

Lydia Metcalf first learned Allen Metcalf was sexually assaulting Amber in 2011 when she walked into Amber’s bedroom and discovered him touching Amber’s vagina. (RR, VOL. 4, pg. 67, ll. 22-25, pg. 68, ll. 3-4, pg. 110, ll. 9-25, pg. 111, ll. 1-25, pg. 112, l. 1).

Lydia Metcalf did not hesitate to order Allen Metcalf out of the house. The State argues that Lydia Metcalf catered to Allen Metcalf wishes and invited the sexual assault of Amber because she allowed Allen Metcalf to return home, but the

evidence is undisputed that from the date Lydia Metcalf had knowledge that Allen Metcalf sexually assaulted Amber she was never sexually assaulted again. (RR. VOL. 4 pg. 110, ll. 9-25, pg. 111, ll. 1-25, pg. 112, l. 1).

Lydia Metcalf was indicted for failing to take reasonable measures to protect Amber from being sexually assaulted by Allen Metcalf on December 10, 2010. The evidence shows that the only event that gave Lydia Metcalf knowledge that Allen Metcalf was sexually assaulting Amber occurred when Lydia Metcalf walked into Amber's bedroom and discovered Allen Metcalf sexually assaulting Amber which occurred long after December 10, 2010. Lydia Metcalf's discovery of Allen Metcalf's sexual assault of Amber in 2011 should not be related back December 10, 2010 to establish Lydia Metcalf's knowledge and intent at the time of Allen Metcalf's sexual assault of Amber on December 10, 2010 because the events are two separate sexual assaults and each offense must be supported by its own evidence of intent.

The State failed to prove beyond a reasonable doubt that Lydia Metcalf had knowledge of Allen Metcalf's sexual assaults of Amber on or before December 10, 2010 and that Lydia Metcalf acted with the intent to promote or assist in the commission of December 10, 2010 sexual assault. The State failed to prove that Lydia Metcalf, with knowledge that the December 10, 2010 sexual assault of Amber by Allen Metcalf had occurred or could occur, failed to take reasonable

measures to prevent the commission of the sexual assault of December 10, 2010. *Carson v. State*, 422 S.W.3d 733 (Tex. App.-Texarkana 2013, pet. ref'd).

**No evidence of intent by Lydia Metcalf**

The State failed to prove beyond a reasonable doubt that it was Lydia Metcalf's conscious objective or desire to engage in the conduct or cause the result of the December 10, 2010 sexual assault of Amber for which she is charged in the indictment. Tex. Penal Code Ann. §6.03(a). There is no direct or circumstantial evidence or reasonable inferences that could be drawn from the circumstantial evidence from which a rational jury could find beyond a reasonable doubt that Lydia Metcalf had the legally required element(s) of intent which are as follows: (1) the conscious objective or desire for Amber to be sexually assaulted by Allen Metcalf, or (2) the conscious objective or desire to engage in the conduct of promoting or assisting in the commission of the offense of the sexual assault of Amber or (3) the conscious objective or desire to fail to take reasonable measures to protect Amber or to prevent the offense, that could lead a rational jury to a finding of guilt.

**Lydia Metcalf did not have knowledge of the sexual assaults of  
Amber on or before December 10, 2010?**

The evidence shows that prior to December 10, 2010, Amber purposefully did not tell her mother about Allen Metcalf's sexual assaults out of fear that Allen Metcalf would harm her siblings (RR, VOL. 4, pg. 53, ll. 16-24, pg. 58, ll. 16-20).

The State argues that Lydia Metcalf's voluntary statement proves that Lydia Metcalf had knowledge Allen Metcalf was sexually assaulting Amber and failed to take reasonable measures to prevent the offense. The voluntary statement of Lydia Metcalf states as follows:

*"Amber and Allen went for a run and Amber came back crying and said Allen slapped her. Allen said he did slap her because of how she acted. Allen went to work and after I talked to Amber for an hour she finally said that Allen tried to pull her shorts down. I called Allen to come home and he said that it wasn't anything sexual, that Amber was whining about having to use the bathroom, so he took her behind a tree and pulled at her shorts. I did not believe him but I had no proof....I gave Amber a whistle and a cell phone and told her to call 911 if Allen tried to touch her again." (RR, VOL. 8, State's Exhibit 1).*

The statement establishes the opposite of what the State hoped to prove because it shows that in connection with the incident when Allen Metcalf slapped Amber and tried to pull her pants down, Lydia Metcalf talked to Amber for an hour before Amber finally admitted that Allen Metcalf pulled on her shorts. During Lydia Metcalf's questioning of Amber, she asked her if this was the only time Allen Metcalf had done something like this and Amber lied to her and said "yes" it was the only time. During the hour long talk with her mother, in a safe and

protected environment and with the opportunity to tell her mother she was being sexually assaulted by Allen Metcalf, Amber consciously chose to not reveal the sexual assaults to Lydia Metcalf. Lydia Metcalf was deliberately kept in the dark about Allen Metcalf's sexual assaults by her frightened daughter.

Amber did not tell Lydia Metcalf that she had been sexually assaulted by Allen Metcalf until after December 10, 2010, the date of the sexual assault that Lydia Metcalf is charged with in the indictment. Lydia Metcalf did not have knowledge of the crime, and without knowledge of the crime the requisite intent required by Tex. Penal Code §7.02(a)(2) and Tex. Penal Code §7.02(a)(3) cannot be formed and proven beyond a reasonable doubt. (RR, VOL. 4, pg. 123, ll. 2-13, pg. 124. ll. 2-12).

## **REPLY TO POINT OF ERROR NUMBER TWO**

**The court of appeals did not error in its analysis of Tex. Penal Code §7.02 (a) (2) and §7.02 (a) (3) or conflate evidentiary requirements in such a way as to impose an addition requirement of proof on the State.**

The State argues that the court below imposed an additional evidentiary burden of requiring the State to prove under Tex. Penal Code §7.02(a)(3) that “at the time of the offense, the parties were acting together, each doing some part of the execution of the common purpose”.

Tex. Penal Code Ann. §7.02(a)(2) & (3) each require the State to prove beyond a reasonable doubt that Lydia Metcalf acted with the “intent to promote

and assist the commission of the offense” and the intent must be shown to exist at the time of or before the commission of crime not at some later date. The State did not suffer an additional evidentiary burden because the State could not prove by either direct or circumstantial evidence that Lydia Metcalf had knowledge of the offense being committed on which she could form the requisite intent required under Tex. Penal Code Ann. §7.02(a)(2) & (3).

The evidence shows that (1) Lydia Metcalf did not acquire knowledge that Allen Metcalf was sexually assaulting Amber from Allen Metcalf either directly or circumstantially because he specifically denied any sexual contact with Amber; (2) Amber purposely did not tell Lydia Metcalf that she was being sexually assaulted by Allen Metcalf because Allen Metcalf threatened to harm her siblings and (3) the two times Amber claims she told Lydia Metcalf that she was being sexually assaulted by Allen Metcalf she did not mention a sexual assault by Allen Metcalf. The State failed to prove any intent by Lydia Metcalf to promote or assist the commission of the offense because it did not prove Lydia Metcalf had knowledge that the sexual assault that occurred on December 10, 2010.

The evidence must show that, at the time of the offense, the parties were acting together, each doing some part of the execution of the common purpose. It follows that if a party does not have knowledge a crime is being committed the requisite intent to promote or assist the commission of the crime cannot be formed.

This court held “To convict someone as a party to an offense, the evidence must show that at the time of the offense the parties were acting together, each doing some part of the execution of the common purpose. *Brooks v. State*, 580 S.W.2d 825 (Tex. Cr. App. 1979). In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *Medellin v. State*, 617 S.W.2d 229 (Tex. Cr. App. 1981); *Ex parte Prior*, 540 S.W.2d 723 (Tex. Cr. App. 1976).

The State argues that the authority cited by the court below pertains to Tex. Penal Code Ann. §7.02(a)(2) and not Tex. Penal Code Ann. §7.02(a)(3) yet each of the foregoing sections contain the phrase “acting with the intent to promote and assist” requiring the court to examine the evidence to determine if at the time of the offense (December 10, 2010) the parties were acting together, each doing some part of the execution of the common purpose,

The court below held that under either Tex. Penal Code Ann. §7.02(a)(2) or §7.02(a)(3) the State was required to prove that Lydia Metcalf acted with intent to promote or assist Allen Metcalf in committing sexual assault by penetrating Amber’s anus with his sexual organ. In order to establish this intent, “the evidence must show that, at the time of the offense, the parties were acting together, each

doing some part of the execution of the common purpose.” *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985). While we look to “events before, during, and after the commission of the offense,” the agreement to act together to execute a common purpose “must be made before or contemporaneously with the criminal event.” *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006); *see Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994)); *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.-Austin 2002, pet. ref’d); *see also Wygal v. State*, 555 S.W.2d 465, 469 (Tex. Crim. App. 1977). Circumstantial evidence alone is sufficient to prove one is a party to an offense. *Carson*, 422 S.W.3d at 742 (citing *Powell*, 194 S.W.3d at 506; *Ransom*, 920 S.W.2d at 302; *Cordova*, 698 S.W.2d at 111).

The court below correctly concluded that in order to convict Lydia Metcalf of the December 10, 2010 offense alleged in the indictment, the jury would have to determine, at a minimum, that Lydia Metcalf was aware of the act alleged in the indictment—anal penetration—before determining that she acted with intent to promote or assist its commission. The State argues that Metcalf was indicted for sexual assault as a party, that she “had a duty to prevent the commission of this and countless other assaults against her daughter,” and that she “was aware of her husband’s sexually abusive conduct toward her daughter.” Yet, the State points

only to conclusory argument in support of its argument that Lydia Metcalf possessed the required intent or that she was aware the sexual assault occurred.

The evidence was legally insufficient because despite the fact that Lydia Metcalf has a duty under the Texas Fam. Code §151.001(a)(2) to protect Amber by preventing the commission of the offense of sexual assault, the State failed to prove Lydia Metcalf had knowledge of the offense from which the required intent to promote and assist could be formed. As such, whether the interpretation of Tex. Penal Code Ann. §7.02(a)(3) by the court below is correct or not is not relevant because the State could not get past the first hurdle of intent by showing that Lydia Metcalf had knowledge of the offense.

### **REPLY TO POINT OF ERROR NUMBER THREE**

**The court of appeals did not view the trial evidence in isolation and ignore the cumulative weight of the evidence.**

The standard of review in a sufficiency challenge is the same for both direct and circumstantial evidence, and circumstantial evidence coupled with all reasonable inferences from that evidence, is as probative as direct evidence in establishing the guilt of an actor. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). Each fact need not point directly and independently to a defendant's guilt, as long as the combined and cumulative force of all the incriminating facts would have permitted a jury to rationally conclude each element of the crime was

proved beyond a reasonable doubt. *Id.* Thus, we may consider circumstantial evidence such as the defendant's acts, words, and conduct before, during, and after the commission of the offense, including evidence consisting of inconsistent statements, impossible explanations, and attempts to conceal incriminating evidence. *Id.* at 50.

The State argues that the court below viewed the evidence in isolation and ignored the cumulative weight of the evidence. The State had to prove beyond a reasonable doubt that Lydia Metcalf “acting with intent to promote or assist the commission of the offense, she solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense” Tex. Penal Code Ann. §7.02(a)(2) or the State had to prove beyond a reasonable doubt that Lydia Metcalf “having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, she fails to make a reasonable effort to prevent commission of the offense” Tex. Penal Code Ann. §7.02(a)(3).

In each of the above subsections the “intent” must be shown to have existed at or before the time of the alleged sexual assault on December 10, 2010 and the State failed to satisfy this requirement of proof.

Although intent can be shown by conduct before, after and during the commission of the offense through direct or circumstantial evidence it does not apply in this case because the State could not prove beyond a reasonable doubt that

Lydia Metcalf was even aware that the December 10, 2010 crime of sexual assault was being committed by Allen Metcalf against Amber.

The opinion of the court below states that it considered the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict by applying the standards of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In applying the *Jackson* standard the court below determined that Metcalf's failure to respond to Amber's cries because Allen Metcalf told her that Amber was just having nightmares did not support the inference that Lydia Metcalf knew that Allen Metcalf was sexually assaulting Amber and the State offered no evidence that the jury determined from other evidence that Lydia Metcalf did not believe Allen Metcalf claim Amber was having nightmares. Without evidence to support the inference that Amber was crying out due to a sexual assault by Allen Metcalf rather than nightmares was based on speculation.

The court below further concluded that Amber's statements to Lydia Metcalf that "Allen was a monster who did bad things" and that he "slapped her and tried to pull down her pants" were insufficient to support a rationale inference that Lydia Metcalf was aware that Allen Metcalf was sexually assaulting Amber as described in the indictment.

In considering the cumulative weight of the evidence the State seeks to have the court consider evidence of an event that occurred after the December 10, 2010

sexual assault alleged in the indictment when Lydia Metcalf walked into Amber's bedroom and discovered Allen Metcalf sexually assaulting Amber along with related evidence that Lydia Metcalf did not inform law enforcement of this event and allowed Allen Metcalf to move back into the home as a means to establish Lydia Metcalf's intent on or before December 10, 2010. After acquired knowledge of an unrelated sexual assault should not relate back to the sexual assault charge in the indictment to establish knowledge and intent because, the intent to promote or assist in the commission of the offense and the agreement to act together to execute a common purpose must be made before or contemporaneously with the criminal event alleged. *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.-Austin 2002, pet. ref'd).

### **PRAYER**

**WHEREFORE**, Respondent-Appellant, Lydia Metcalf respectfully prays that this Honorable Court affirm the judgment of the Sixth Court of Appeals and for such other and further relief to which the Respondent-Appellant may or is shown to be justly entitled.

Respectfully submitted,

*/s/ William J. Robertson*

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**ATTORNEY FOR APPELLANT**

### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the “Respondent-Appellant’s Brief” was served on all counsel of record by U.S. Mail, Certified, Return Receipt Requested and/or by facsimile and/or email and/or the Court’s electronic notification service on this 23<sup>rd</sup> day of April 2019.

Ms. Gena Bunn  
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Longview, Texas 75608  
Email: gbunn@genabunnlaw.com

*/s/ William J. Robertson*

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William J. Robertson

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Tex. R. App. P., Rule 9.4(i)(3), I certify that this Respondent-Appellant's Brief and Appendix was created by a computer using Microsoft Word with a word count function that indicates the word count of this document is 4483 words.

*/s/ William J. Robertson*

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William J. Robertson

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

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STATE OF TEXAS, Petitioner-Appellee

V.

LYDIA METCALF, Respondent-Appellant

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On Petition for Discretionary Review  
From the Sixth Court of Appeals, Texarkana, in Cause No. 06-17-00211-CR  
Reversing Appellant's conviction in the 123<sup>rd</sup> Judicial District Court,  
Panola County, Texas in Trial Court Case No. 2015-C-0290

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**APPELLANT'S APPENDIX**

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**APPENDIX TAB 1**

Judgment of Acquittal



**Court of Appeals  
Sixth Appellate District of Texas**

**J U D G M E N T**

Lydia Metcalf, Appellant

No. 06-17-00211-CR      v.

The State of Texas, Appellee

Appeal from the 123rd District Court of Panola County, Texas (Tr. Ct. No. 2015-C-0290). Opinion delivered by Justice Burgess, Chief Justice Morriss and Justice Moseley participating.

As stated in the Court's opinion of this date, we find there was error in the judgment of the court below. Therefore, we reverse the trial court's judgment and render a judgment of acquittal.

We further order that the appellee, The State of Texas, pay all costs of this appeal.

RENDERED OCTOBER 16, 2018  
BY ORDER OF THE COURT  
JOSH R. MORRISS, III  
CHIEF JUSTICE

ATTEST:  
Debra K. Autrey, Clerk